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Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption

Keywords

Adopted Children, Children, Domestic Relations, Indian Law, International Law: History

BARRIERS TO THE SUCCESSFUL IMPLEMENTATION OF THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

Caeli Elizabeth Kimball*

INTRODUCTION

The recent tsunami disaster that devastated many regions in Southeast Asia on December 27, 2004, has brought an unprecedented outpouring of humanitarian aid from around the world.¹ Some of the most heart-rending images beamed into American homes have been pictures of frightened children temporarily or permanently separated from their parents, many of whom were killed. In response to the disaster, Americans have flooded the U.S. Department of State with phone calls and letters voicing interest in adopting Tsunami orphans.²

American families' strong interest in international adoption is by no means a new phenomenon. For the last fifty years, economic, social, and political changes in foreign countries have led hundreds of thousands of American families to adopt foreign children for altruistic and personal reasons. After World War II, families from the United States rushed to adopt orphans from Germany, Italy, and Greece.³ Similarly, both the Korean and Vietnam wars prompted huge movements by American families to adopt Korean and Vietnamese children.⁴ Only thirty Romanian children were internationally adopted in 1989, but the economic and social policy shifts of the Cold War allowed for over 10,000 intercountry adoptions to take place following Nicolae Ceausescu's fall in 1991.⁵ China, Russia, and Korea are examples of sending countries reluctant to allow their orphans to be internationally adopted, but Russia is currently "the world's largest supplier of orphans" to U.S. families, with China as a close second.⁶

Despite the overwhelming number of American families yearning to adopt tsunami orphans, the Department of State must look to the principles behind the

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1. See eg., Jonathan Padgett, *Danish Dancing: Morten Misson and Camera Take a Turn Around the Ballroom*, WASH. POST, Jan. 13, 2005, at C05; *Charity Breakfast Aids Asian Tsunami Children*, INS. DAY, Jan. 14, 2005, available at LEXIS, News Library, Ins. Day File.

2. Chris Echegaray, *Tsunami Orphans' Adoption Restricted*, TAMPA TRIB., Jan. 7, 2005, available at LEXIS, News Library, Tampa Trib. File.

3. Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov./Dec. 2003, available at LEXIS, News Library, Foreign Aff. File.

4. *Id.*

5. *Id.*; see also Linda J. Olsen, *Live or Let Die: Could Intercountry Adoption Make the Difference?* 22 PENN. ST. INT'L L. REV. 483, 499-500 (2004).

6. Kapstein, *supra* note 3.

U.S. Intercountry Adoption Act of 2000 (IAA)⁷ and to international adoption laws that promote legal adoptions and protect interests of children worldwide.⁸ In doing so, the Department of State announced its decision to disallow the adoption of tsunami children by American families for three reasons: (1) the United States received reports of child trafficking for illegal adoption of Tsunami children; (2) the current inability of the countries of origin to determine whether children are legally orphaned;⁹ and (3) the strong likelihood that children are experiencing substantial trauma from the natural disaster, which would potentially increase the emotional impact of moving to a foreign country for adoption into a new family.¹⁰ These considerations make a strong cause for caution; intercountry adoption may not be within the best interests of tsunami children at this time.¹¹

These recent events triggered a discussion over international adoption that should bring renewed attention to the status of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).¹² For over a decade, the Hague Convention has been the driving force for nations to establish governing regulations over a process that leads to a definitive event in the lives of adopted children and their adoptive families. Although these efforts have achieved a measure of success to date,¹³ significant political and cultural obstacles must be overcome before an international consensus regulating intercountry adoptions can truly be put in place. Those barriers, as shown in this paper, may be insurmountable.

Since its popularization in the 1950s, intercountry adoption has been subject to a mesh of conflicting adoption laws and red tape in both sending and receiving countries.¹⁴ It was not until horrific stories of child trafficking and child abduction were unearthed and reported in international media that international organizations saw the drastic need to establish uniformity in intercountry adoption regulations and procedures.¹⁵ In 1989, the United Nations initiated the Convention on the

7. Intercountry Adoption Act of 2000, Pub. L. 106-279, Stat. 682, 2000 H.R. 2909, tit. 1(2d. Sess. 2000).

8. See Echegaray, *supra* note 2 [hereinafter IAA]

9. To be deemed an orphan, the country of origin must conclude that the parents of the child are deceased, or that the child has been legally abandoned in order to legally terminate parental rights.

10. Echegaray, *supra* note 2; Jean Hopfensperger, *Disaster in Asia: Foreign Adoptions: Children of Tsunami Victims Aren't Adoption Candidates*, STAR TRIB., Jan. 7, 2005, available at LEXIS, News Library, Star Trib. File. "Country of origin" means the country from which the orphaned child being adopted is domiciled.

11. Hopfensperger, *supra* note 10.

12. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, [herein the "Hague Convention"], 32 I.L.M. 1134, 1135, 1139, (1993).

13. See *eg.*, AUSTIN T. FRAGOMEN, JR., ET AL., IMMIGRATION PROCEDURES HANDBOOK [herein "IMMIGRATION PROC. HANDBOOK"], Ch. 14, Intro. (2004).

14. Susann M. Bisignaro, *Comment: Intercountry Adoption Today and the Implications of the 1993 Hague Convention of Tomorrow*, 13 DICK. J. INT'L L. 124, 126-31 (1994). Sending countries are countries that put their children up for international adoption. Sending countries is synonymous for "country of origin." Receiving countries are countries where the prospective adoptive parents reside, which will be the child's country of citizenship once the adoption has been finalized.

15. Kapstein, *supra* note 3.

Rights of the Child (CRC), to recognize children's human rights.¹⁶ The CRC laid the foundation for the Hague Convention, enacted in 1993, which established regulations and procedures to protect the interests of the children being adopted and sought to potentially unify international adoption laws.¹⁷ The goals and values underlying the Hague Convention have been received with great support, with sixty-four countries ratifying or acceding to the Hague Convention as of August 2004.¹⁸ However, the United States, one of the largest receiving countries, and China and Korea, historically two of the largest sending countries, have yet to become parties.¹⁹

Although Congress adopted the IAA in 2000, it had not been put into effect as of January 2005. Until that occurs, the United States cannot become a party to the Hague Convention. The concerns delaying the United States' implementation of the Hague Convention are primarily rooted in financial and business concerns, rather than cultural and moral perspectives. Not only do sending countries potentially face these same issues, but many of the primary sending countries also face the more serious problem of societal and cultural objections to international adoption of their children. Even if sending countries permit adoptions to take place, it is unlikely that these sending countries will endorse an international agreement that imposes procedures that must be followed in order to participate in international adoptions with member countries.

The Hague Convention fails to address several conceptual and practical issues that are critical to achieving its goals. Despite good intentions to protect the interests of children being adopted, and to establish systems for ensuring legal adoptions, the Hague Convention favors compliance of receiving countries, which tend to be wealthier and more able to bear the economic burdens posed by compliance than comparatively poor sending countries. The treaty depends on the cooperation between the receiving and sending countries, and three of the largest sending countries—Russia, China, and Korea—have yet to ratify the Hague Convention over a decade after signing the treaty.²⁰ Although the Hague Convention sets forth specific requirements for its members regarding intercountry adoption procedures, nowhere does the treaty prohibit members from engaging in intercountry adoptions with non-members. Signatories of the Hague Convention

16. Convention on the Rights of the Child (herein the "CRC"), G.A.Res. 44, U.N. GAOR, 61st Plen. mtg., U.N. Doc. A/RES/44/25/20 (1989).

17. Hague Convention, *supra* note 12, 32 I.L.M. at 1139.

18. IMMIGRATION PROC. HANDBOOK, *supra* note 13.

19. In this paper, "member states" and "parties" are used interchangeably to label those countries that have ratified or acceded to the Hague Convention. Countries who ratify the Hague Convention are referred to as members, parties, or Hague countries. The Hague Convention is referred to by name, or by "the treaty," as all compacts between nations are described as 'conventions' or as 'treaties,' since there is no substantial distinction in the terms. See *generally* 74 AM.JUR.2D TREATIES §2 (2005).

20. This paper recognizes that Russia is the largest sending country at this moment in time; however, this paper will only focus on China and Korea to examine the impact of the cultural issues in combination with the economic burdens of implementation that influence these sending countries' decision to ratify the Hague Convention. Russia does not possess the same long history of participation in intercountry adoption, nor the history of cultural opposition to the practice like China and Korea.

agree to the purpose and goals behind the treaty but the treaty does not require every signer to ratify or accede to it.

The undue economic burden of compliance, in conjunction with underlying social and cultural opposition to intercountry adoption, provides little incentive for ratification by major sending countries, such as China and Korea, who have actively participated in intercountry adoption for over half a century. In all likelihood, intercountry adoptions between parties and non-parties to the Hague Convention will continue even if major sending countries choose not to ratify the treaty, undermining the goals and purpose of the Hague Convention.

Part I of this paper looks at some of the reasons that sending countries such as China and Korea depend on intercountry adoption to care for their orphans. From the sudden trend of allowing international adoptions came corrupt adoption practices and child trafficking stories that cried for international adoption regulations. Part II explores the regulations set forth by the Hague Convention and the influences of early international legislation, attempting to establish regulations for intercountry adoptions. In addition, this paper addresses issues that were not, but should have been addressed by the Hague Convention. Part III examines the steps the United States has taken to ratify the Hague Convention, and the controversies that have slowed down the process. Part IV looks at the social and cultural opposition, in conjunction with the economic burdens of compliance on sending countries that exceeds the burden on receiving countries that make the major sending countries reluctant and slow to ratify the Hague Convention. This paper concludes that, although the Hague Convention promotes and regulates the practice of intercountry adoption, in an effort to protect both the children being adopted and abolish corrupt practices, the treaty neglects to recognize economic and cultural issues that impose barriers to some of the major sending countries. By failing to recognize these major hurdles, the Hague Convention fails to provide sufficient incentives for major sending countries to become parties to the treaty. Accordingly, the Hague Convention may not achieve the goals of cooperation between sending and receiving countries and the unification of international adoption laws.

I. THE INTEREST AND NEED FOR INTERCOUNTRY ADOPTIONS BEG FOR REGULATION OF INTERCOUNTRY ADOPTION PRACTICES

A. Interest in Intercountry Adoptions is at an All-Time High

The number of intercountry adoptions has progressively increased over the last fifty years as sending countries looked internationally for solutions when they encountered a domestic shortage in available homes for their orphans and unwanted children. While the concept was virtually unheard of in the United States prior to World War II,²¹ a total of 18,447 foreign-born children were adopted by U.S. families in the year 2000.²² In 2001, over 34,000 intercountry

21. Olsen, *supra* note 5, at 496-97 (citing U.S. Dep't of Justice, Statistical Yearbook of the Immigration and Naturalization Service (1986)).

22. Intercountry Adoption, National Adoption Information Clearinghouse 2001, U.S. Department of Health and Human Services, available at http://naic.acf.hhs.gov/pubs/f_inter/f_inter.cfm (last visited

adoptions took place worldwide, with the United States receiving over 19,000 adoptees.²³ 20,000 foreign born children were adopted in 2003 alone.²⁴ Interest in intercountry adoption is escalating at such a rapid pace that families willingly foot international adoption fees anywhere from \$12,000 to \$30,000 and wait one to three years for the entire adoption process to be completed.²⁵ The greatest number of internationally adopted children come from China, Russia, South Korea, Guatemala, Romania, Vietnam, Ukraine, India, and Cambodia.²⁶ In general, these countries resort to international adoption as a means of providing for some of their children when they are faced with economic, social, and political changes or problems.

B. Overpopulation and Domestic Family Policies Lead Countries to Allow Their Orphans and Unwanted Children to be internationally adopted

China and Korea have been two of the primary sending countries for over half a century. Cultural gender attitudes, overpopulation, and in China's case, domestic family law policies, lead Asian families to abandon their children, creating a large number of orphans and unwanted children in need of adoptive homes.²⁷ In Asian culture, it is atypical to have non-relative adoption, which in part is the reason why Asian families reject adopting children from overseas.²⁸ The stigma associated with adopting a non-relative makes it difficult to find willing adoptive parents in the country of origin. Due to the nonexistence of domestic adoptions and the increasing number of children overcrowding orphanages, China and Korea turned to foreign countries for placement of their orphaned children in homes overseas.

1. China

Deeply engrained in the minds of China's people is the belief that sons should be valued more highly than daughters, leading many Chinese women to abandon their newborn girls.²⁹ Statistics show that 95 percent of China's orphanages are filled with females.³⁰ An estimated 150,000 baby girls are abandoned yearly, though the Chinese government can hardly guess the number of babies unknowingly drowned.³¹

In conjunction with the dominant value placed on sons, Chinese family law policies account for the increasing need for Chinese orphans to be internationally

Jan. 3, 2005) [hereinafter NAIC].

23. Kapstein, *supra* note 3.

24. Ann M. Simmons, *U.S. Proposals on Adoptions Abroad get Mixed Reviews*, L.A. TIMES, Nov. 14, 2003, at A24.

25. NAIC, *supra* note 22.

26. *Id.*

27. See generally, Jessica L. Singer, *Intercountry Adoption Laws: How can China's One-Child Policy Coincide with the 1993 Hague Convention on Adoption*, 22 SUFFOLK TRANSNAT'L L. REV. 283 (1998).

28. *Id.* at 296.

29. See Ivan Png, *Change of Chinese Heart on Adoption*, STRAITS TIMES (SINGAPORE), Nov. 8, 2004, available at LEXIS, News Library, Straits Times File.

30. *Id.*

31. RITA J. SIMON & HOWARD ALSTEIN, *ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS* 11 (2000).

adopted. To control the serious overpopulation problem plaguing China, the Chinese government implemented a one-child policy in 1979.³² Under this policy, parents wanting to give birth to more than one child must obtain permission from their regional government years prior to actual conception.³³ Violations of the one-child policy range from wage cuts to refusal of government benefits, such as food rations and free education.³⁴ By prohibiting families from having more than one child, the government places Chinese families under extreme pressure to conceive a son who can carry on the family name and provide support to his parents in their old age.³⁵ The government and cultural pressures contribute greatly to the number of abandoned female newborns simply because they were the first-born children and were not male.

2. Korea

Like China, Korea has become one of the largest sending countries in the world for international adoption. The Korean government began allowing its children to be placed through intercountry adoptions in 1954 and since then between 150,000 and 200,000 South Korean children have been adopted internationally.³⁶ The 1954 action resulted from the large number of Korean children fathered by American servicemen during the Korean War.³⁷ Many of these children were orphaned by the war or abandoned because of their mixed heritage³⁸ and rather than deal with them domestically, the Korean government allowed a large number of them to be internationally adopted. As of 2004, 7,000 Korean children are abandoned each year, and approximately 2,000 of those children are adopted overseas.³⁹ For countries such as Korea and China who either cannot, or are reluctant to care for their orphans, intercountry adoption poses a good solution for overcrowded orphanages and allows countries to provide orphans good homes. However, the increase of intercountry adoptions was accompanied by corruption and wrongdoing, which set the stage for an important effort to regulate intercountry adoption through international agreements.

32. *Id.* at 9; Singer, *supra* note 27, at 290-91. China's population grew from almost 700 million to just under 1000 million people from the early 1960s to 1979, when the one-child policy was enacted. China: Historical Demographical Data of the Whole Country, at <http://www.library.uu.nl/wesp/populstat/Asia/chinac.htm> (last visited March 21, 2005). Since the policy was enacted in 1979, China's population has only increased by approximately 100 million people in ten years. *Id.*

33. Singer, *supra* note 27, at 291.

34. *Id.* at 292.

35. *Id.* at 294.

36. Khang Hyun-sung, *Sweet Intent, Bitter Legacy*, S. CHINA MORNING POST, Sept. 13, 2004, available at LEXIS, News Library, S. China Morning Post File.

37. *Id.*

38. It can be implied that children of mixed heritage have mixed bloodlines, tainting the purity of treasured Korean bloodlines. See generally SIMON & ALSTEIN, *supra* note 31, at 7.

39. *A Beautiful Wedding*, KOREA HERALD, Oct. 13, 2004, available at LEXIS, News Library, Korea Herald File.

C. Corrupt Adoption Practices, Child Trafficking and Red Tape Created Urgency for Uniformity of Intercountry Adoption Regulations and Procedures

Allowing children to be internationally adopted provides a service to both sending and receiving countries. Sending countries can decrease overpopulation and “get rid of” unwanted children, which in turn allows parents in receiving countries to adopt a new member into their family when they are unable to have their own children, or are moved to adopt a child in need. Unfortunately, the many positive benefits of intercountry adoption opens the door to persons who willingly facilitate adoptions solely in the interest of turning a profit. One major news story that exposed corruption in the intercountry adoption process documented how senior officials in Honduras aided in kidnapping children from poverty-stricken families and sold them to interested foreigners in the early 1990s.⁴⁰ A U.N. report, issued in 2000, revealed that Guatemala was the leading supplier of infants worldwide, Guatemalans were involved in the “buying and selling of children, the falsification of documents, the kidnapping of children, and the housing of (these) babies awaiting private adoption.”⁴¹ Yet another instance of child trafficking surfaced, revealing that Romanian nuns coerced single mothers to give up all rights to their children, allowing the nuns to make up to \$15,000 profit per child.⁴² Over the years, these stories of corruption tarnished the reputation of intercountry adoption as a whole, making receiving countries skeptical about “doing business” with sending countries for fear that they might inadvertently promote corrupt adoption proceedings.⁴³

The lack of uniformity among national procedures and laws regarding intercountry adoption not only encouraged corruption, but created red tape for parents interested in intercountry adoption.⁴⁴ For example, many Asian countries preferred that all adoption proceedings be handled by U.S.-based adoption agencies; contrastingly, countries in Central and South America preferred direct adoptions, requiring the adoptive parents to directly contact orphanages and child services in the foreign country.⁴⁵ Along with the lack of procedural uniformity came a lack of monitoring and enforcement of adoption procedures, allowing governments in the sending countries to demand more “gifts” in return for relinquishing a child.⁴⁶

Faced with the reports of corrupt adoption procedures and child trafficking, many receiving countries condemned countries known for their corrupt adoption

40. Kapstein, *supra* note 3.

41. *Id.*

42. Amy Grillo Kales, *The Intercountry Adoption Act of 2000: Are its Laudable Goals Worth its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?* 36 GEO. WASH. INT'L L. REV. 477, 484 (2004).

43. Sending countries known for selling their children have tarnished reputations, as it shows that the countries are not following regulations to promote lawful adoptions. See generally Kapstein, *supra* note 3.

44. Bisignaro, *supra* note 14, at 125.

45. *Id.* at 125-26.

46. *Id.* at 126.

practices, refusing to “do business” with them.⁴⁷ A struggle emerged, as countries could not condone the corrupt behavior of some sending countries,⁴⁸ yet so many benefits came from the practice of intercountry adoption. There was an imminent need for regulation of intercountry adoptions and protection of children’s rights. Individual countries, as well as international bodies of law decided that it was time to take action and create some uniformity in adoption laws to prevent child trafficking and safeguard proper adoption procedures.

II. THE EFFORT TO ACHIEVE INTERNATIONAL UNIFORMITY OF PROCEDURES TO GOVERN INTERCOUNTRY ADOPTIONS

A. *Convention on the Rights of the Child*

From the many instances of child trafficking that began soon after the popularization of intercountry adoption, the United Nations made a formal push to recognize the human rights of children by adopting the CRC on November 20, 1989.⁴⁹ The CRC is rooted in the Geneva Declaration of the Rights of the Child of 1924, the first international declaration to recognize that children are entitled to special care and protection.⁵⁰ The CRC defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”⁵¹ All parties to the CRC are responsible for protecting children against all forms of discrimination and punishment.⁵² Two monumental points of the CRC are the requirement that all action be taken in “the best interest of the child,”⁵³ and that parties will protect against child trafficking by “combat[ing] the illicit transfer and non-return of the children abroad.”⁵⁴ These principles carried over into the Hague Convention.

B. *The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*

Protecting the interests of the child and combating child trafficking were important first steps made by the CRC, but regulation and monitoring of intercountry adoptions were essential pieces missing from that treaty. Uniformity of regulations and systematic oversight of intercountry adoption proceedings represented key components to achieving the premises set forth in the CRC.

On May 29, 1993, the Hague Convention was completed, thereby introducing measures to govern international adoptions.⁵⁵ Signing the Hague Convention

47. Echegaray, *supra* note 2.

48. Countries infamous for their corrupt practices are Honduras, Guatemala, and other Central American countries. See Kapstein, *supra* note 3.

49. CRC, *supra* note 16. The Commission on Human Rights drafted the CRC. *Id.* Human rights of a child not only include humanitarian rights, but civil, political, economic, social, and cultural rights. *Id.*

50. *Id.* at Preamb. The Declaration was drafted by Save the Children International Union, and adopted by the League of Nations in 1924.

51. *Id.* at art.1.

52. *Id.* at art.2(2).

53. *Id.* at art.3(1).

54. *Id.* at art.11(1).

55. Hague Convention, *supra* note 12, 32 I.L.M at 1134-36, Introductory Note.

indicates an intention to eventually become a party to the treaty;⁵⁶ however, countries who sign the treaty are under no obligation to ratify it.⁵⁷ The Hague Convention only legally binds those countries who ratify the treaty to become members.⁵⁸ Therefore, countries may choose to accede to the Hague Convention, instead of ratifying it, affirming their commitment to the policy without becoming bound by its terms.⁵⁹

As of August 1, 2004, sixty-four countries have become parties to the Hague Convention.⁶⁰ To be successful, the Hague Convention needs the participation of both the sending and receiving nations.⁶¹ The four primary goals of the Hague Convention are:

- (1) to ensure that the international adoption is in the child's best interest;
- (2) to create a cooperative system amongst participating nations, in efforts to curtail child trafficking and prevent other abuses;
- (3) to ensure that intercountry adoptions that conform to the Hague Convention's requirements are recognized; and
- (4) to ensure proper consent to the adoption.⁶²

To accomplish these goals, the Hague Convention poses three generalized categories of compliance: (1) investigation of the child and the parents to ensure that the adoption is in the child's best interests;⁶³ (2) creation of a central authority in each member state to establish domestic adoption regulations and to oversee all

56. Meghan Hendy, *Hague Convention: Next Steps for the United States*, *Bulletin of the Joint Council on International Children's Services*, (Winter 2004), available at www.jcics.org/HagueNextSteps.pdf (last visited Jan. 7, 2005).

57. *Id.*

58. Notesong Srisopark Thompson, *Note: Hague is Enough?: A Call for More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L. J. 441, 457 (2004).

59. Hague Convention, *supra* note 12, 32 I.L.M at 1144, Ch.VII, art. 44; Thompson, *supra* note 58, at 459.

60. Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Status Table, Member States of the Organisation [herein "Status Table of Contracting States with Hague Convention"] available at http://hcch.evison.nl/index_en.php?act=conventions.status&cid=69 (last visited Jan. 15, 2005); see also IMMIGRATION PROC. HANDBOOK, *supra* note 13. The sixty-four countries party to the Hague Convention are: Albania, Andorra, Australia, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Columbia, Costa Rica, Czech Republic, Cyprus, Denmark, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Guatemala, Guinea, Iceland, India, Israel, Italy, Latvia, Lithuania, Luxembourg, Madagascar, Malta, Mauritius, Mexico, Republic of Moldova, Monaco, Mongolia, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, United Kingdom, Uruguay, and Venezuela. *Id.*

61. Hague Convention, *supra* note 12, 32 I.L.M at 1134-38, Context Summary.

62. Hague Convention, *supra* note 12, 32 I.L.M at 1139, Ch.I, art.1; see also U.S. Department of Justice, Fact Sheet: The Intercountry Adoption Act of 2000, Approval of the Hague Convention Regarding Intercountry Adoption, Immigration and Naturalization Service [herein "US Approval of Hague Convention"], available at <http://uscis.gov/graphics/publicaffairs/factsheets/adoption.htm> (last visited Jan. 3, 2005); Thompson, *supra* note 58, at 456.

63. Hague Convention, *supra* note 12, 32 I.L.M. at 1139, Ch.I, art.1.

intercountry adoption proceedings,⁶⁴ and (3) cooperation among sending and receiving countries throughout the adoption process to legitimize the adoption in both the sending and receiving countries.⁶⁵

The Hague Convention divides the initial investigation of the child and the prospective parents between the sending and receiving countries.⁶⁶ The sending country is responsible for establishing that the child is an orphan without existing parental ties,⁶⁷ while the receiving country must conduct home studies to determine the fitness of the prospective family to raise and care for the child.⁶⁸ Both of these processes are imperative to concluding that the adoption is in the best interests of the child. In order to make such a determination, the sending country must establish: (1) that the child is adoptable; (2) the adoption is in the child's best interests; and (3) consent from necessary parties, such as persons, institutions, and authorities that have been "duly informed of the effects of their consent," and have given their consent freely.⁶⁹ A child may not be adopted unless he or she is legally orphaned;⁷⁰ defined as one whose two living natural parents are incapable of properly caring for the child and whose parents freely give written irrevocable consent to terminate their legal relationship with the child, allowing the child to be adopted and emigrate.⁷¹

The receiving state must ensure that: (1) the prospective adoptive parents are both "eligible and suited to adopt"; (2) the prospective parents have been counseled on intercountry adoption and the process; and (3) the child is authorized to enter and permanently reside in the receiving state.⁷² These investigatory procedures eliminate the possibility of birth parents coming forward in the future to declare that the child is not an orphan.⁷³

To ensure that the proper investigations and duties are performed, the Hague Convention requires countries to establish a central authority to oversee all steps of the intercountry adoption process.⁷⁴ To effectuate the purpose behind the Hague Convention, the central authorities set requirements for accreditation of non-profit adoption agencies,⁷⁵ as well as staffing requirements to ensure that adoptive

64. *Id.* at 1139-1136, Ch. I, art. I, Ch. III.

65. *Id.* at 1139, Ch. I, art. 1.

66. *Id.* at 1139-40, Ch. II, art. 4-5.

67. *Id.*, Ch. II, art. 4.

68. *Id.* at 1140, Ch. II, art. 5.

69. *Id.* at 1140, Ch. II, art. 4(1)-(3).

70. AUSTIN T. FRAGOMEN, JR., ET AL., IMMIGRATION LAW AND BUSINESS §3:15 (2004) [herein IMMIGRATION LAW & BUS.].

71. *Id.*; AUSTIN T. FRAGOMEN, JR., ET AL., IMMIGRATION LEGISLATION HANDBOOK [hereinafter IMMIGRATION LEG. HANDBOOK] §4:34 (2004).

72. Hague Convention, *supra* note 12, 32 I.L.M at 1140, Ch. II, art. 5.

73. *Id.* at 1142, Ch. V, art. 26.

74. *Id.* at 1140, Ch. III, art. 6-10; *see also* Madelyn Freundlich, *Transracial & Transcultural Adoptions: A Look at the Ethical Issues*, 27 FAM. ADVOC. 40, 43 (2004); Thompson, *supra* note 58, at 458.

75. Hague Convention, *supra* note 12, 32 I.L.M at 1140, Ch. III, art. 10-12. The Hague Convention requires the accreditation of adoption agencies who wish to handle intercountry adoptions. *Id.* To become an accredited non-profit agency (as the Hague Convention only regulates non-profit agencies),

agencies are operated efficiently by trained, experienced, and qualified staff.⁷⁶ Other important functions relegated to the central authorities are maintaining information on all children entering and leaving the authority's borders through intercountry adoption, establishing the suitability and eligibility of the prospective adoptive parents, and granting authorization for the child to enter and permanently reside in the receiving state.⁷⁷ By supervising each step of the intercountry adoption process, central authorities are kept well-informed, preventing any potential financial gain by disallowing corrupt adoption practices to slip past authorities.⁷⁸

To ensure that the adoptions are legally recognized both in the sending and receiving countries, the Hague Convention sets forth requirements for the sending and receiving countries to actively communicate and cooperate with one another throughout the process.⁷⁹ This partly involves the exchange of necessary information such as statistics, standard forms, and laws.⁸⁰ In addition, central authorities must issue adoption or custody certificates for all adoptions of children residing in Hague countries, providing conclusive evidence of the relationship between the adopted child and the adoptive parents.⁸¹ The Hague Convention enumerated this requirement due to past problems with recognizing intercountry adoptions once the child emigrated to his or her new home and country.⁸² By law, adoptions certified by the authority of the country of origin must be legally recognized in other receiving countries.⁸³ "Recognition" includes acknowledgment of the legal relationship between the adoptive parents and the adoptive child, the parental responsibility of the adoptive parents for the child, and the termination of the pre-existing legal relationship between the child and his or her mother.⁸⁴

By setting forth these regulations that require member states' compliance, the Hague Convention hopes to ensure, first and foremost, that all intercountry adoptions are in the best interests of the child. In general, widespread ratification or accession to the Hague Convention could unify intercountry adoption laws. The Hague Convention needs the support of the majority of sending and receiving countries to work together to end child trafficking and corrupt adoption practices. The efficiency of the intercountry adoption process and the unification of intercountry adoption laws stand to strengthen the reputation of the practice. Though it is important to point out the positive effects of the Hague Convention, it is equally imperative to review the pitfalls of the international treaty.

agencies must meet ethical standards, training standards for its employees, and be subject to supervision by authorities of the State. *Id.*

76. *Id.* at 1140, Ch.III, art.11(b).

77. *Id.* at 1140, Ch.III, art.6-18; Freundlich, *supra* note 74, at 43; Thompson, *supra* note 58, at 458.

78. Hague Convention, *supra* note 12, 32 I.L.M at 1140, Ch.III, art.8.

79. *Id.* at 1141, Ch.III, art.7, 20.

80. *Id.* at 1140, Ch.III, art.7.

81. *Id.* at 1141, Ch.III, art.15-16; IMMIGRATION LEG. HANDBOOK, *supra* note 71.

82. Bisignaro, *supra* note 14, at 130-32.

83. Hague Convention, *supra* note 13, 32 I.L.M at 1142, Ch.III, art.23.

84. *Id.* at 1142, Ch.III, art.26 (1)(C).

C. The Hague Convention Fails to Address Important Issues Regarding Compliance

Despite establishing safeguards and uniformity, the Hague Convention fails to address several issues that are crucial to its ultimate implementation. These issues perpetuate inequalities in sending and receiving countries' compliance with the Hague Convention. For example, one would assume that the Hague Convention would specifically prohibit intercountry adoptions with non-members, but this is stated nowhere in the text of the treaty. Such a requirement would provide an incentive and motivation for both sending and receiving countries to comply with Hague Convention regulations. In addition, the signers of the Hague Convention are not required to take any actions towards ratifying or acceding to the treaty, imposing no obligations upon non-members. Countries that do choose to ratify or accede to the treaty must incorporate the Hague Convention terms into their domestic and international laws, which is no small feat.⁸⁵ Although a sending or receiving country may support the goals of the Hague Convention, the economic and other costs of compliance may be overly burdensome, potentially causing non-parties to put off compliance with the Hague Convention to a point in the future, if ever, thereby losing any incentive to become a party now.

Another interesting piece missing from the Hague Convention is a section regarding penalties for non-compliance with the regulations—this job is reserved for each member state to determine through its own legislation and its central authority.⁸⁶ The problem with leaving punishment, such as sanctions or fines, up to the individual countries is that self-regulation could encourage corrupt adoption practices that will go unpunished without a non-partisan governmental organization monitoring compliance and administering enforcement.

By failing to create an immediate incentive for countries to take measures to become parties to the Hague Convention, the treaty allows for sending countries to hold off on compliance—common sense indicates that receiving countries are more likely to be punished by non-compliance than sending countries. Currently the United States is one of the countries that has signed, but not yet ratified the Hague Convention, and is not expected to ratify it until late 2006 or early 2007.⁸⁷ One potential repercussion of U.S. failure to ratify the Hague Convention is that some member countries may limit their intercountry adoptions to other member countries, possibly resulting in a suspension of adoptions with the United States until its ratification.⁸⁸

Interestingly, more frequently the sending countries will restrict working with non-parties and seldom do receiving countries enforce such a restriction, unless the

85. In order for countries to be members of the Hague Convention, they must integrate the Hague Convention requirements into their domestic laws. See generally Hague Convention, *supra* note 12, 32 I.L.M. at 1139-40, Ch. II, Ch. III.

86. See Hague Convention, *supra* note 12, 32 I.L.M. at 1139-41, Ch. III.

87. Hendy, *supra* note 56; IMMIGRATION PROC. HANDBOOK, *supra* note 13; Freundlich, *supra* note 74.

88. Freundlich, *supra* note 74, at 42.

sending country is well-known for child-trafficking.⁸⁹ Sending countries that have historically prevented Americans from adopting their children, such as Bolivia, Brazil, and Slovakia, would open their orphanages to Americans, if the United States complied with the Hague Convention regulations.⁹⁰ Receiving countries actively seek intercountry adoption due to low birth rates and are therefore less likely to place restrictions on the countries from where they may receive children based on the desire to adopt and create families.

The Hague Convention created inequality among the receiving countries and sending countries, making it more likely that receiving countries will comply with the treaty in order to broaden the possibilities of places to receive children. At the same time, sending countries have the liberty to be particular about the countries that may adopt their children, and it is unlikely that receiving Hague countries will cease to engage in intercountry adoptions with non-Hague countries. The cost and organization required to conform with the Hague Convention pose two reasons why some countries continue to avoid the Hague Convention⁹¹ or have trouble complying.

III. THE UNITED STATES ENACTS THE INTERCOUNTRY ADOPTION ACT OF 2000

The United States is regarded as a wealthy receiving country, yet it is not one of the sixty-four countries that has ratified the Hague Convention. Supporting the Hague Convention's purpose and goals is one thing—complying with the regulations to ratify the treaty is an entirely different matter. Taking the first steps towards compliance, the United States passed the IAA in 2000,⁹² which is only the first step to fully implement the Hague Convention. The delay in the U.S. ratification of the Hague Convention in part stems from the long process of reviewing the public comments regarding the proposed legislation,⁹³ and the opposition voiced by many adoption agencies.

A. U.S. Intercountry Adoption Laws Prior to the IAA

Strongly supporting the intentions and goals of the Hague Convention, the United States, like other supporting countries, has worked to comply with the regulations in order to become a party to the treaty. As one of the largest receiving countries, the United States would benefit from becoming a party to the Hague Convention through newfound access to adopt from countries that previously have refused the United States as a recipient of children.⁹⁴

89. See Echegaray, *supra* note 2.

90. Jeff D. Opydke, *Changes in Global Rules Toughen Process*, WALL STREET J., Oct. 14, 2003 available at <http://www.lgri.org/news/article.php?newsID=578> (last visited March 21, 2005).

91. *Id.*

92. See SARAH IGNATIUS & ELISABETH S. STICKNEY, *IMMIGRATION LAW AND THE FAMILY*, §13:35, Hague Convention On Intercountry Adoption (2005).

93. The Department of State publishes the rules and reviews public comments submitted during the public comment period. They may choose to incorporate the suggestions and modifications from the public comments into the regulations but are not required to do so. The review period typically is open for 90 days unless the Department chooses to extend the time period. See generally 1 Admin. L. & Prac. § 4.32 (2d ed. 2005); Hendy, *supra* note 56.

94. Opydke, *supra* note 90.

The United States signed the Hague Convention on March 31, 1994, demonstrating its intent to ratify the Hague Convention.⁹⁵ Congress passed the IAA in September of 2000, establishing intercountry adoption regulations to comport with the Hague Convention.⁹⁶ Since September 2004, the U.S. Department of State has been reviewing public comments to the proposed regulations.⁹⁷ By revamping the U.S. intercountry adoption policies, the IAA benefits the United States, as well as starting the process of compliance with the Hague Convention regulations.

Prior to the IAA, some called U.S. intercountry adoption policies and procedures inefficient thanks to the repetitive nature of the process.⁹⁸ Adoptive parents not only had to comply with the country of origin's laws, where they might only gain guardianship of the child, but also were required to go through the U.S. judicial systems to fully adopt the child.⁹⁹ Often times, parents of adoptive children had to re-adopt the child in the U.S. after adopting the child in the country of origin because two-thirds of the U.S. courts failed to recognize the validity of the adoption in the country of origin.¹⁰⁰ Another redundancy that occurred during the pre-IAA intercountry adoption process came from complying with the Immigration and Naturalization Services (INS) requirements to obtain an orphan's visa. This process often duplicated the check that the country of origin performed to ensure that the child was an orphan and that the adoption was in the best interests of the child through home studies of the prospective parents.¹⁰¹ In addition, each state has adoption laws and procedures that must be complied with in order to finalize an adoption.¹⁰² These administrative glitches and problems served as deterrents to potential adoptive parents who otherwise would adopt internationally, if not for the redundant process and red tape.

B. The Intercountry Adoption Act of 2000

The purpose of the IAA is three-fold:

- (1) to implement the Hague Convention in the United States;
- (2) to protect the rights and prevent the abuses against children, birth families, and adoptive parents involved in adoptions subject to the Hague Convention, ensuring the adoptions are in the children's best interests; and
- (3) to improve the federal government's ability to assist U.S. families seeking to adopt children from countries party to the Hague convention.¹⁰³

The IAA outlines the responsibilities of various federal agencies in regard to

95. Thompson, *supra* note 58, at 457.

96. Anna Mary Coburn, et al., *International Family Law*, 38 INT'L LAW 493, 493 (2004).

97. IMMIGRATION PROC. HANDBOOK, *supra* note 13.

98. Bisignaro, *supra* note 14, at 130.

99. *Id.*

100. *Id.*

101. *Id.* at 131. See *eg.*, Colo. Rev. Stat. §§19-5-200 to -216 (2005).

102. Bisignaro, *supra* note 14, at 131.

103. IAA, *supra* note 7, Pub. L. 106-279, Stat. 682, 2000 H.R. 2909, §2(b); Coburn, *supra* note 96, at 494.

intercountry adoption.¹⁰⁴ In accordance with the Hague Convention's requirement that each country designate a central authority to be responsible for intercountry adoption, the Department of State and the Bureau of Consular Affairs, Office of Children's Issues was designated as the central authority.¹⁰⁵ Along with the Department of State, the Department of Health and Human Services and the INS worked to draft federal implementing legislation to conform with the Hague Convention regulations.¹⁰⁶ As the central authority, the Department of State is responsible for monitoring the adoption procedures in each adoption case and for creating a case registry to record all incoming and outgoing adoptions, as well as an annual report to Congress.¹⁰⁷

A substantial portion of the IAA establishes an accreditation system for adoption agencies and provides for the monitoring of accredited agencies to ensure that the agencies comply with the IAA and the Hague Convention. One of the most controversial sections of the IAA is Public Law Section 203(B)-G), which requires agencies to: (1) hire a sufficient number of trained, qualified personnel; (2) possess sufficient financial resources, organizational structure and procedures; (3) hire social services professionals to capably provide adoption services; and (4) have liability insurance.¹⁰⁸ Agencies and approved individuals who fail to comply with either the IAA or the Hague Convention are subject to enforcement actions such as sanctions and suspension or cancellation of accreditation.¹⁰⁹

The IAA also adds a new Immigration and Nationality Act §101(b)(1)(G) for international adoptions.¹¹⁰ The new definition of child requires adoptive parents to be U.S. citizens and at least twenty five years of age in order to adopt a child under the age of sixteen at the time the immigrant petition is filed.¹¹¹ Similar to the language in the Hague Convention, Public Law Section 103(b) requires that the Attorney General be satisfied with the investigatory process before she can conclude that the prospective parents are fit to care for the child and that the child is indeed an orphan.¹¹²

On September 15, 2003, the Department of State published a proposed rule in the *Federal Register*, addressing the accreditation of adoption agencies and approval of persons providing adoption services in Hague Convention cases.¹¹³

104. IAA, *supra* note 7, Pub. L. 106-279, Stat. 682, 2000 H.R. 2909, tit.1, §§101-103.

105. *Id.* at §101; U.S. Approval of Hague Convention, *supra* note 62. See also Thompson, *supra* note 58, at 458; Peter H. Pfund, *Introductory Note to the U.S. Intercountry Adoption Act of 2000*, 41 I.L.M. 222, 222 (2002).

106. Pfund, *supra* note 105, at 222.

107. IAA, *supra* note 7, Pub. L. 106-279, Stat. 682, 2000 H.R. 2909, tit.1,§§102(e), 104.

108. *Id.* at §203(b)(1)(B)-(G).

109. *Id.* at §202(3).

110. *Id.* at §302(a)(3); U.S. Approval of Hague Convention, *supra* note 62; IGNATIUS & STICKNEY, *supra* note 92.

111. IAA, *supra* note 7, Pub. L.106-279, Stat. 682, 2000 H.R. 2909, tit.3, §302(a)(3); U.S. Approval of Hague Convention, *supra* note 62; IGNATIUS & STICKNEY, *supra* note 92.

112. IAA, *supra* note 7, Pub. L. 106-279, Stat. 682, 2000 H.R. 2909, §302(a)(I)-(IV); U.S. Approval of Hague Convention, *supra* note 62.

113. Hague Convention on Intercountry Adoption; Intercontry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed.Reg. 54064, 68

Once a final list of accredited and approved adoption providers is completed, the United States will be in a position to ratify the Hague Convention.¹¹⁴ The Department of State has been preoccupied with reviewing public comments, many of which voice an opposition to the legislation based on the imposing liability costs and administrative costs of compliance for the adoption agencies.

C. Serious Concerns Over Financial, Licensing, and Administrative Operations Issues Have Delayed Adoption of Regulations and Ratification of the Hague Convention

Despite the time and energy put forth to draft and pass legislation reforming intercountry adoption regulations, the United States still has a ways to go before it can ratify the Hague Convention. One of the current controversies that keeps the United States from ratifying the Hague Convention is the varied reactions of adoption agency services in regard to the requirements of the IAA.¹¹⁵ Some adoption agencies are concerned that the costs of international adoptions will increase with the regulations.¹¹⁶ Typically, international adoption fees cost anywhere between \$15,000 - \$25,000.¹¹⁷ The regulations may cause smaller agencies to go out of business because compliance will impose greater liability upon the agencies, as well as increased fees.¹¹⁸ Weeding out the small adoption agencies might make it impossible for anyone but the larger agencies with the strongest financial profile and largest liability insurance policies to succeed in the adoption business.

Many adoption agencies, large and small,¹¹⁹ have voiced concerns that compliance with the stringent regulations requires large extensions of insurance coverage and carrying three months operating expenses as a financial base, potentially putting many of them out of business.¹²⁰ The IAA, as written, makes the U.S. agencies responsible for the actions of their employees working abroad,

Fed.Reg. 54119 (proposed Sept. 15, 2005), (to be codified at 22 C.F.R. pt. 96, 22 C.F.R. pt. 98), available at <http://www.gpoaccess.gov/ft/index.html> (last visited March 21, 2005); Public Comments Update, at www.travel.state.gov/family/adoption/implementation/implementation_470.html (last visited March 21, 2005); Coburn, *supra* note 96, at 494.

114. Coburn, *supra* note 96, at 494.

115. Freundlich, *supra* note 74, at 43.

116. Simmons, *supra* note 24.

117. *Id.*

118. *See id.*

119. Spence Chapin may be considered a large agency, as it handles between 140-170 international adoptions a year, while an agency like Angel's Haven Outreach only handles a total of 40-50 adoptions in a year. *See* Spence Chapin Services to Families and Children, *Comments on Proposed Regulations Issued by the Department of State Hague Convention on Intercountry Adoption and the Intercountry Adoption Act of 2000, Accreditation of Agencies, Approval of Persons, Preservation of Convention Records* [herein "Spence Chapin"], Dec. 15, 2003, at 1, available at http://travel.state.gov/family/adoption/implementation_1519.html (last visited Jan. 16, 2005); Angel's Haven Outreach, *Public Comment*, Dec. 15, 2003, available at http://travel.state.gov/family/adoption/implementation_1519.html (last visited Jan. 16, 2005).

120. *See* AAA Partners in Adoption, Inc. [herein "AAA Partners"], *Public Comment*, Nov. 6, 2003, available at http://travel.state.gov/family/adoption/implementation_1519.html (last visited Jan. 16, 2005).

whether they committed errors as innocuous, as clerical errors, or serious problems such as medical misdiagnoses or inaccurate documentation.¹²¹ The New Jersey-based agency, Reaching Out Thru International Adoption, submitted a public comment to the Department of State, declaring, "American agencies cannot reasonably be expected to visit every orphanage, attend every doctor's visit, file every paper for every child eligible for international adoption."¹²²

Despite their support for the goals and purpose behind the Hague Convention and the IAA, Spence-Chapin Services to Families and Children (Spence-Chapin), a private, non-profit adoption agency that handles between 140-170 international adoptions a year, expressed opposition to the proposed regulations that hold primary provider agencies responsible for actions of entities abroad.¹²³ Spence-Chapin argued that, as written, the regulations would impose "an unmanageable financial burden on the agencies," to the point that they are "unworkable and unrealistic."¹²⁴ Spence-Chapin voiced that compliance with day-to-day supervision of American adoption agencies' international counterparts would be extremely costly, and therefore compliance would be impossible, putting many adoption agencies out of business.¹²⁵

The price of liability insurance would spike to prohibitive levels due to the new liability placed on primary adoption services; furthermore, many insurance companies are likely to refuse to insure the adoption agencies.¹²⁶ In addition, the proposed regulations "invite litigation," because the proposed regulations fail to cap damages, provide a quantum of proof, or statute of limitations.¹²⁷

Another common concern and complaint of organizations writing in public comments to the Department of State, is the unrealistic nature and impracticality of requiring all staff members to have a Master's Degree in Social Work (herein a "MSW").¹²⁸ Spence-Chapin commends the State Department for requiring that staff members conducting home studies and other social services functions, be required to have a master's degree in social work or related fields, as well as significant clinical experience.¹²⁹ For other agencies, such as the Family Adoption Consultants, which handles between 100-120 international adoption cases yearly, the master's degree requirement for staff members would heavily increase their operations costs and limit available staff.¹³⁰ In their opinion, a Bachelor's Degree in social work or human services is more than sufficient.¹³¹ This IAA requirement

121. Simmons, *supra* note 24.

122. *Id.*

123. Spence Chapin, *supra* note 119, at 13.

124. *Id.*

125. *Id.*

126. *Id.* at 7.

127. *Id.* at 7-8.

128. AAA Partners, *supra* note 120; Family Adoption Consultants, *Public Comment*, Dec. 1, 2003, available at http://travel.state.gov/family/adoption/implementation_1519.html (last visited Jan. 16, 2005).

129. Spence Chapin, *supra* note 119.

130. Family Adoption Consultants, *supra* note 128.

131. *Id.*

would prevent qualified staff members with years of experience and degrees from working for adoption agencies solely because these staff members never received a MSW.¹³²

The concerns voiced in the public comments demonstrate that the language of the IAA poses major issues to adoption agencies. Liability insurance premiums will likely reject coverage of many adoption agencies, based on the new IAA requirement that agencies be liable for all actions of overseas employees, over whom agencies have limited control.¹³³ In addition, the requirement that staff members earn a MSW precludes many qualified employees from operating adoption agencies.¹³⁴ As the public comments show, it will be extremely difficult for adoption agencies to be accredited in accordance with the IAA, and in turn the Hague Convention, if the language of the statute remains unchanged. Over a decade after signing the Hague Convention, the United States is still attempting to ratify the treaty.¹³⁵ The message that comes across from the United States' slow movement towards ratification is that compliance with the Hague Convention takes a great deal of time, effort, and money and that it creates many conflicts along the way.

The problems that the United States faces in its efforts to ratify and implement the Hague Convention plague sending countries on an even larger scale. Major sending countries allow their children to be raised with adoptive families overseas due to the sending countries' inability to care for them.¹³⁶ In addition to the financial burdens of compliance, cultural issues and national pride create potential walls to the ratification and compliance of sending countries, which will in turn, potentially undermine the goals of the Hague Convention.

IV. RATIFICATION OF PRIMARY SENDING COUNTRIES IS THREATENED BY CULTURAL OPPOSITION AND ECONOMIC BURDENS

A. Social Stigmas and Conflicting Domestic Policies Make it Unlikely that China and Korea will Ratify the Hague Convention

1. Domestic Policies Interfere with Compliance with the Hague Convention

Although China signed the Hague Convention in November 2000,¹³⁷ the country has yet to ratify it, or show signs that it will in the future.¹³⁸ Chinese law

132. AAA Partners, *supra* note 120.

133. The IAA requires that each adoption agency have liability insurance. IAA, *supra* note 7, Pub. L. 106-279, Stat. 682, 2000 H.R. 2909, tit. 3, §203(b)(1)(E).

134. AAA Partners, *supra* note 120.

135. See Freundlich, *supra* note 74, at 43.

136. See *eg.* Singer, *supra* note 27, at 306.

137. Status Table of Contracting States to the Hague Convention, *supra* note 60.

138. Singer, *supra* note 27, at 304. Russia has yet to ratify the Hague Convention, though it seems like ratification could occur in the future, based on a comment by Russian Federation Council Social Policy Committee Chairman, Valentina Petrenko, who says that the Education Ministry will be the Central Authority "after the document's ratification." *U.S. Senators Moves to Protect Adopted Children's Rights*, INTERFAX NEWS AGENCY (RUSSIA), April 16, 2003, available at LEXIS, News Library, Interfax News Agency File. Some objections that Russians have against international adoption is the belief that their children should be raised in the Russian culture. Penny Owen, *From*

gives preference to friends and relatives of the biological parents adopting the child.¹³⁹ In 1992, China passed an adoption law stating that foreigners may adopt Chinese children, thereby abandoning its old requirement that the adoptive parents be of Chinese descent or have close ties to China.¹⁴⁰ The Republic of China agreed to treat foreigners, regardless of heritage, the same as nationals.¹⁴¹ Though China established the China Adoption Organization to regulate adoption in order to stop child trafficking,¹⁴² China has yet to take steps necessary to ratify the Hague Convention.

Part of the problem is that China would need to change its domestic family laws. China's current law conflicts with the Hague Convention, as Chinese law states, "an adoption shall not contravene laws and regulations on family planning laws and regulations."¹⁴³ Chinese parents who give up a child for adoption may not have another child without violating the family planning regulations.¹⁴⁴ The one-child policy encourages Chinese families to abandon their female babies until a male is born, conflicting with the Hague Convention's goal of taking all appropriate measures to allow the child to remain in his or her family of origin.¹⁴⁵ In light of the China's difficulty in changing its domestic laws to comply with the international regulations, it becomes clear that ratification of the Hague Convention would be no small feat for China.

2. Underlying Beliefs that Adoption is Disgraceful Make Sending Countries Wary of Further Encouraging Incountry Adoption

In Asian regions, particularly Korea, bloodlines are extremely important because they establish one's character.¹⁴⁶ Despite this pride, Korea has a reputation for being a major baby exporter, sending thousands of its children to be adopted overseas.¹⁴⁷ Part of Korean opposition to sending Korean children overseas to be adopted by non-Korean families is the belief that adoption will strip

Russia with Love: American Families Embrace Russian Orphans, THE SUNDAY OKLAHOMAN, Aug. 2, 1998, available at LEXIS, News Library, Sunday Oklahoman File.

139. Singer, *supra* note 27, at 304.

140. Adoption Law of the People's Republic of China, April 1, 1992, Ch.II, art.2 (1992); see also Crystal J. Gates, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe*, 7 IND. J. GLOBAL LEGAL STUD. 369, 386 (1999).

141. Gates, *supra* note 119, at 386 (citing Order of the President of the People's Republic of China No. 54, Adoption Law of the People's Republic of China [herein "Adoption Law of the People's Republic of China"], available at http://www.fwcc.org/china_adoption_law_98.htm (last visited Jan. 1, 2005)).

142. *Id.* at 387-88. The China Adoption Organization supervises the intercountry adoption process and coordinates adoption by foreigners. *Id.* at 387. The China Adoption Organization looks at the applications and investigates the qualifications of each set of prospective parents. *Id.* If the China Adoption Organization approves the adoption, then it will proceed to find a prospective child to be adopted. *Id.* at 388.

143. Adoption Law of the People's Republic of China, *supra* note 141, Ch. I, art.3.

144. Singer, *supra* note 27, at 307.

145. *Id.* at 308-09; Hague Convention, *supra* note 12, 32 I.L.M at 1139, Ch. II.

146. SIMON & ALTSTEIN, *supra* note 31, at 7.

147. Hyun-sung, *supra* note 36; *Rethinking Adoption*, KOREAN HERALD, Aug. 9, 2004, available at 2004 WL 55442567.

the child of his or her lineage and heritage, on which Korean culture prides itself.¹⁴⁸ Culturally, Koreans see adoption as “disgraceful [and] shameful.”¹⁴⁹ Korea’s reputation as a baby exporter has fueled the societal belief that adoption disgraces the country.¹⁵⁰ For example, one story that made headlines in the run-up to the 1988 Seoul Olympics was, “Babies for Sale: South Korea makes them, America buys them.”¹⁵¹ In response to the worldwide publicity attracted by this judgmental headline, the Korean government placed a moratorium on the number of Korean children available for intercountry adoption.¹⁵²

When Korea’s economy was growing in the 1990s,¹⁵³ the Korean government contemplated ending intercountry adoption altogether by 2015,¹⁵⁴ feeling that the nation should move toward full dependency on domestic adoption.¹⁵⁵ To encourage domestic adoptions, the government offered benefits in the form of housing loans, tax exemptions, and school fee exemptions to Korean families willing to adopt Korean children.¹⁵⁶ However, a slow down in Korea’s economic growth, forced the government to increase the number of overseas adoptions again in 1998, at least temporarily delaying progress toward ending intercountry adoption,¹⁵⁷ because Korea was not prospering at the rate it had hoped.¹⁵⁸ Thus, nationalism and economics provoked the movement to decrease the number of children available for international adoption.¹⁵⁹

The national pride fueling the Korean government’s desire to take care of its children backfired, as few Koreans wanted to adopt children who were not of their own family bloodlines.¹⁶⁰ Cultural beliefs prevent Korean families from wanting to raise children outside of their blood lines.¹⁶¹ Of the 7,000 children who are orphaned and abandoned in Korea each year, Koreans only adopt 1,600-1,700.¹⁶²

Korean adoption laws are extremely particular in regard to who may be certified as an adoptive parent. Foreign families are granted permission to internationally adopt Korean children, only as a last resort once the government has exhausted all methods to find willing Korean families to adopt the children.¹⁶³

148. SIMON & ALSTEIN, *supra* note 31, at 7.

149. Hyun-sung, *supra* note 36.

150. *Id.*

151. *Id.*

152. *See id.*

153. SIMON & ALSTEIN, *supra* note 31, at 8.

154. Shin Hye-son, *Foreign Adoptions Increase for the First Time in 11 Years*, KOREA HERALD, May 5, 1999, available at LEXIS, News Library, Korea Herald File.

155. Margaret Liu, *International Adoption: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 238 n.128 (1994).

156. Hye-son, *supra* note 154.

157. Hyun-Sung, *supra* note 36.

158. *PM Thaksin is Right to Apply Business Practices to Military Procurement*, THE NATION (THAILAND), July 9, 2003 available at LEXIS, News Library, The Nation File.

159. *See id.*

160. A Beautiful Wedding, *supra* note 39.

161. *Id.*

162. *Id.*

163. Liu, *supra* note 155, at 203.

Though international adoption is allowed, the Korean government restricts eligible prospective parents to married, heterosexual couples in good health and of solid moral character and economic stability, with the stipulation that the parents provide the child with an education, as well as freedom of religion.¹⁶⁴

Based on national pride, cultural beliefs, and domestic policies, China and Korea are unlikely to ratify the Hague Convention in the foreseeable future, despite their consistent use of the intercountry adoption system to care for their orphaned children. Although China and Korea both allow for intercountry adoption, they both have expressed an inclination for having children domestically adopted, preferably by relatives, or if relatives are not an option, friends of the child's parents.

B. The Burden of Complying with the Hague Convention Establishes Another Reason for Sending Countries to Refuse Ratification

The problems that the Hague Convention poses to sending countries are the same as those posed to receiving countries, though the means of compliance present a far greater burden on sending countries.¹⁶⁵ The United States is unquestionably one of the wealthiest and most powerful countries in the world and one of the largest receivers of internationally adopted children,¹⁶⁶ yet the United States has pushed off ratification of the Hague Convention year to year, currently estimating full compliance and ratification sometime in 2006 or 2007.¹⁶⁷ Compliance takes a great deal of time and money; for poorer countries facing political turmoil and economic down turn, compliance poses an even bigger problem. The Hague Convention delegates an enormous responsibility upon the sending countries to investigate the legality of the child who is orphaned and to determine whether the adoption is in the child's best interests.¹⁶⁸

As history shows, intercountry adoption is at its peak when world disasters, wars, and other economic or political changes occur because richer and more stable countries have families who want to try to rescue children from the plight of poverty and instability.¹⁶⁹ These disasters and situations of turmoil make it extremely difficult for affected countries to support their children, thus forcing them to allow their children to be internationally adopted. China's orphanages in

164. *Id.*

165. See generally Kelly M. Wittner, *Curbing Child-Trafficking in Intercountry Adoptions: Will Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?* 12 PAC. RIM L. & POL'Y J. 595, 617 (2003).

166. See discussion, *supra*.

167. Thomson, *supra* note 58, at 458; Freundlich, *supra* note 74, at 43; Hendy, *supra* note 56.

168. Hague Convention, *supra* note 12, 32 I.L.M. 1139-40, Ch. I, art. 1-3, Ch. II, art. 4-5.

169. See Kapstein, *supra* note 3; Echegaray, *supra* note 2.

the 1990s were so heavily inundated with female infants that the staff and resources could not care for the large number of children, resulting in high mortality rates.¹⁷⁰ As recorded in 1999, the United States adopted between 80 and 90 percent of Chinese orphans.¹⁷¹

Although the Chinese and Korean economies are growing, and available statistics demonstrate that only four to five percent of the people in each country live in poverty,¹⁷² neither country perceives itself to be economically stable enough to place a moratorium on, or formally end, intercountry adoption.¹⁷³ Whether the countries are truly in economic need or whether they are simply not willing to allocate the resources to care for their orphans and unwanted children is beyond the scope of this paper.

Despite its equal intentions, the Hague Convention favors compliance by receiving countries with the laws, citizens, and resources that generally support intercountry adoption and facilitate compliance. In the United States, the Department of State has been preoccupied in part by the reviewing of public comments to the IAA, the American attempt to implement the requirements of the Hague Convention. In comparison, sending countries such as China and Korea culturally oppose dependence on intercountry adoption to raise their children but engage in the practice out of necessity. In light of the stigma these countries attach to intercountry adoption, it seems logical to assume that if countries like China and Korea had the resources, they would sooner take the money to devote to the care of their orphans, ending the shameful practice, than to use the money to implement and ratify the Hague Convention, which promotes intercountry adoption. By failing to recognize the heightened economic burden of compliance and the cultural opposition to intercountry adoption, the Hague Convention creates disincentives for major sending countries to become parties to the Hague Convention, which potentially undermine the goals of the treaty.

CONCLUSION

The Hague Convention was drafted in such a manner that it encourages cooperation among countries to unify adoption procedures and regulations; the Convention's good intentions, however, leave room for problems that could undermine realistic achievement of the treaty's goals. Nowhere in the treaty does

170. Human Rights Watch, March 1996, Vol 8, No.1, Summary, available at <http://www.hrw.org/summaries/s.china963.2html> (last visited Jan. 14, 2005).

171. Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM. L. & POL'Y J. 189, 189 (1999).

172. See China at a glance, 2003, available at worldbank.org/cgi-bin/sendoff.cgi?page=countrydata/aag/chn+aag.pdf (last visited Jan. 23, 2005). Korea, Rep. at a glance, 2003, available at www.worldbank.org/cgi-bin/sendoff?page=%2Fdata%2Fcountrydata%2Faag%2Fkor_aag.pdf (last visited Jan. 23, 2005); Economy of South Korea, available at http://www.appliedlanguage.com/country_guides/korea_south_country_economy.shtml (last visited Jan. 2, 2005).

173. See generally, Liu, *supra* note 155, at 192; Hye-son, *supra* note 154; Kapstein, *supra* note 3; Singer, *supra* note 27, at 306.

it restrict parties from entering intercountry adoptions with non-parties, providing no push for countries to ratify or accede to it. For the Hague Convention to operate and function as it was intended requires the ratification and cooperation of both sending and receiving countries. The Hague Convention is blind to the fact that the burdens of compliance on sending countries exceeded those of receiving countries, both in the priority to draft and implement regulations, as well as the economic stability to fund compliance.

Despite the goals and purpose behind the Hague Convention, it is highly unlikely that intercountry adoptions between parties and non-parties will come to an end, though receiving countries will have spent the time and money on complying with the Hague Convention and major sending countries will not have. The message this sends is that compliance and becoming a party to the Hague Convention do not affect the sending countries' ability to participate in intercountry adoption, making it questionable as to why they should spend their resources and time on the compliance. After all, the old saying goes, "why buy the cow when you can get the milk for free?" If sending countries are not penalized for non-compliance with the Hague Convention, and the sending countries are well-aware that they have a "hot commodity" that many people want no matter the cost, then why would a sending country bother to spend the time and money to implement the Hague Convention, despite its admirable purpose and goals. If the sending countries possess the resources to implement solid regulation and monitoring of intercountry adoptions, they are more likely to spend the money on supporting their own orphans to save face and move away from intercountry adoption based on social stigma and national disdain for the practice of intercountry adoption.

The Hague Convention can accomplish great things with uniformity of intercountry adoption laws, but as it stands, there is no motivation for sending countries like Korea and China to ratify or accede to it. Without the cooperation of major sending and receiving countries, the Hague Convention will not meet its objectives. The United States, despite slow-moving efforts to ratify the Hague Convention, supports intercountry adoption and the objectives and principles behind the Hague Convention. In contrast, sending countries like China and Korea lack the national support to ratify the Hague Convention, because intercountry adoption practices promote shameful dependency on foreign countries. Korea would abolish intercountry adoption if the country's economy were strong enough to support its children, hence why the Korean government set a goal to end intercountry adoption by 2015. Based on similar Asian values, it would not be surprising if China followed suit one day in the future. The cultural opposition and the economic burden of compliance are the two major influences that will keep sending countries like China and Korea from ratifying the Hague Convention.

While it seems like the support of over sixty countries is a sign that the Hague Convention is and will succeed, the fact that the treaty is unsupported by three of the major sending countries sends a message that creating a system of unification of intercountry adoption laws was not enough. The Hague Convention should have stressed the need for compliance of all sending and receiving countries, limiting member states to intercountry adoptions through other member states;

thereby creating incentives for major sending countries to ratify. As it stands, compliance with the Hague Convention is in the best interest of receiving countries, who will benefit from adoption access to countries who previously prevented them from adopting. Sending countries, on the other hand, are given the liberty to limit the receiving countries that may adopt their children, because they know that receiving countries are desperate to adopt children, no matter the costs. The Hague Convention cannot succeed when sending countries may still benefit from intercountry adoption without complying with the Hague Convention. Despite the appearance of moving forward in intercountry adoption laws, the lack of cooperation by major sending countries keeps this forward movement from being a possibility.

Even though the United States' delayed implementation of the Hague Convention does not turn on fundamental cultural or moral values, the continuing failure of the U.S. ratification potentially sends a message to the world that the United States does not consider the Hague Convention a necessary means of regulating international adoptions. If one of the largest and wealthiest receiving countries is not compelled to move on this issue, then why should major sending countries, such as China and Korea, feel any particular need to take on the economic burdens that might be associated with implementing the Hague Convention in the face of societal and cultural objections?

The Tsunami disaster, impacting the lives of thousands of children left orphaned, has brought a public spotlight on the potential role of international adoptions as a form of humanitarian outreach to children with needs that go beyond aid in the form of water, food, shelter, and material items. As of now, the Hague Convention has yet to realize its commendable goals and given the problems discussed in this paper, may never do so. From this point forward, there needs to be a serious public debate over the best means to regulate international adoptions to protect the best interests of children and also to achieve maximum cooperation among sending and receiving countries. The reaction of the Department of State to requests from American families to adopt tsunami orphans suggests that the United States, in principle, will not take actions that would violate the spirit of the Hague Convention. Yet, until the major sending and receiving countries ratify the treaty, there is no certainty as to what, if any, impact the Hague Convention might have on future international adoption issues. The real question that needs resolution is whether the international community truly needs a controlling international treaty such as the Hague Convention to assure that the best interests of intercountry adoptees are protected as the first priority. If so, then proponents must undertake a concerted effort to persuade all countries, including the United States, that ratification is a matter of urgency, or to come together to explore an agreement that would be acceptable to the major sending and receiving countries participating in international adoptions.